



9

Re: Patent Application

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Barry J. Fiala and Mark B. Hodes
Application No. 10/041,934
Filed: January 8, 2002
Group Art Unit: 2161
Examiner: (unknown)
Assignee: Riverborne Communications, LLC
Att'y Docket No.: A0,031
For: Point-of-Sale Activation and Subsequent Registration of Products

RECEIVED

APR 14 2003

OFFICE OF PETITIONS*Certificate of Mailing under 37 C.F.R. § 1.8*

I hereby certify that this Response and Request for Reconsideration, with attached Declaration of Bill M. Wade, Esq. (5 pages) and attached Exhibit A (10 pages), and with attached Declaration of Russell H. Walker, Esq. (2 pages) is being deposited by me with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to:

U.S. Patent and Trademark Office
P.O. Box 2327
Mail Stop DAC
Arlington, VA 22202

on 4/4/2003
Date: 4/4/2003

Russell H. Walker
Russell H. Walker
U.S.P.T.O. Registration No. 35,401

**Response and Request for Reconsideration
of U.S.P.T.O. Decision on
Petition under 37 C.F.R. § 1.47(a)
to Accept Application when an Inventor Refuses to Sign**

On August 13, 2002, Assignee Riverborne Communications, LLC, submitted a Petition under 37 C.F.R. § 1.47(a), requesting that the U.S.P.T.O. accept this Application without the signature of one of the co-inventors, namely, Mark B. Hodes, who had refused to sign the Declaration for this Applications.

On October 4, 2002, the Office of Petitions issued its Decision on said Petition, dismissing the Petition because of certain deficiencies, namely, the alleged lack of sufficient proof that the non-signing inventor was presented with a copy of the complete application papers for the instant non-provisional application. The Office of Petitions indicated that all other requirements for granting of the Petition had been met.

Assignee Riverborne Communications, LLC, respectfully requests reconsideration of the Decision on said Petition under 37 C.F.R. § 1.47(a) in view of the evidence presented herewith. The previously-submitted Petition and its Exhibits are hereby fully incorporated herein by reference.

A supplemental Declaration of Bill M. Wade, Esq., is submitted herewith stating the facts concerning Mr. Hodes' refusal to sign this application. To distinguish citations to this supplemental Declaration of Bill M. Wade filed herewith from the Declaration of Bill M. Wade that was filed with the Petition on August 13, 2002, the supplemental Declaration of Bill M. Wade submitted herewith will be cited hereinbelow as "Supplemental Declaration of Wade." A Declaration of Russell H. Walker, Esq., is also submitted herewith stating additional facts concerning Mr. Hodes' refusal to sign this application, and is cited as "Declaration of Walker."

A court action is pending in state court to determine ownership of this invention, and a copy of the Complaint in that pending court action is attached to the supporting Declaration of Mr. Wade. *Supplemental Declaration of Wade*, ¶¶ 3, 5, 6. Mr. Hodes' initial attorneys have withdrawn from representation of him, and Mr. Hodes present attorney is Todd B. Murrah, who is registered to practice before the U.S. Patent and Trademark Office, and who is an attorney with the Memphis firm of Glassman, Edwards, Wade & Wyatt, P.C.

Supplemental Declaration of Wade, ¶¶ 7, 8.

On information and belief, Mr. Hodes' work address is:

Peregrine Marketing, LLC
5350 Poplar Avenue, Suite 750
Memphis, Tennessee 38119

Supplemental Declaration of Wade, ¶ 9.

On information and belief, Mr. Hodes' last-known residential mailing address is:

Mark B. Hodes
7009 Rose Trail Drive
Memphis, Tennessee 38135

Supplemental Declaration of Wade, ¶ 10.

On August 8, 2002, Mr. Wade provided Mr. Hodes with a Declaration for the instant Application, together with a full copy of the Application. *Supplemental Declaration of Wade, ¶ 11.* In a telephonic conversation on August 9, 2002, Mr. Wade was told by Mr. Hodes that Mr. Hodes expressly and unequivocally refused to sign the Declaration for the instant Application, and that "it has always been" his position that he would refuse to sign any such Declaration, and that he would never sign any such Declaration in the future.

Supplemental Declaration of Wade, ¶¶ 11, 12.

During March 2003, Mr. Wade provided Mr. Murrah, who is the patent attorney now representing Mr. Hodes, with a copy of the Application with Claims, the Application Data Sheet that accompanies the Declaration, the Formal Drawings, and all Prior Art that has been submitted to the U.S. Patent and Trademark Office pursuant to the Duty of Disclosure.

Supplemental Declaration of Wade, ¶ 14. In a telephone conversation with the undersigned attorney on April 4, 2003, Mr. Murrah stated to the undersigned attorney that Mr. Hodes refused to sign the Declaration for this Application. *Declaration of Walker, ¶ 7.*

The other named inventor for this application, namely, Barry J. Fiala, has signed the Declaration for this application, and the Declaration executed by Mr. Fiala is submitted with the Response filed previously with the Response to the Notice to File Missing Parts.

It is believed that the previously filed Petition under 37 C.F.R. § 1.47(a), when supplemented by the facts and evidence provided with this Response and Request for Consideration, should now be granted, and that this application is now in condition for examination and allowance.

Submitted concurrently herewith is a Petition for a Four-Month Extension of Time for the filing of this Response and Request for Reconsideration, together with the required fee for the Extension of Time. If any additional fee should be required for submission of this petition or for submission of the papers filed concurrently herewith, or if any refund should be due, please charge any such additional fees or credit any overpayment concerning the filing of the papers filed concurrently herewith to Deposit Account No. 23-0125.

Respectfully submitted,

Riverborne Communications, LLC

Date: 4/4/2003

By: Russell H. Walker

Russell H. Walker
U.S.P.T.O. Registration No. 35,401
Walker, McKenzie & Walker, P.C.
6363 Poplar Ave., Suite 434
Memphis, Tennessee 38119-4896
Tel. No. (901) 685-7428
Attorney for
Riverborne Communications, LLC



Re: Patent Application

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Re Application of: Barry J. Fiala and Mark B. Hodes
Application No. 10/041,934
Filed: January 8, 2002
Group Art Unit: 2161
Examiner: (unknown)
Assignee: Riverborne Communications, LLC
Att'y Docket No.: A0,031
For: Point-of-Sale Activation and Subsequent Registration of Products

Certificate of Mailing under 37 C.F.R. § 1.8

I hereby certify that the attached Declaration of Bill M. Wade, Esq. (5 pages) with attached Exhibit A (10 pages) is being deposited by me with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to:

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Russell H. Walker
Russell H. Walker
U.S.P.T.O. Registration No. 35,401



Re: Patent Application

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Barry J. Fiala and Mark B. Hodes
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Group Art Unit: (unknown)
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Assignee: Riverborne Communications, LLC
Att'y Docket No.: A0,031
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OFFICE OF PETITIONS

Commissioner for Patents
Washington, D.C. 20231

**Declaration of Bill M. Wade, Esq.
in Support of Petition under 37 C.F.R. §1.47(a)
when an Inventor Refuses to Sign**

I, Bill M. Wade, hereby declare as follows:

1. I am an attorney licensed to practice in the State of Tennessee, having a Tennessee Board of Professional Responsibility registration number of #21056.
2. Upon information and belief, Mark B. Hodes is a named inventor of U.S. Patent Application No. 10/041,934 (the "Application"), filed on or about January 8, 2002, in the U.S. Patent and Trademark Office.
3. On or about July 26, 2001, an action styled *Riverborne Communications, LLC v. Mark Hodes* was filed in Chancery Court in Memphis, Tennessee as Case No. CH-01-1564-3, to obtain a court order holding, *inter alia*, that Riverborne Communications, LLC ("Riverborne") is the owner of the invention disclosed and claimed in said Application, and to further order Mark Hodes to sign an Assignment to

Riverborne to that effect, and to sign any necessary papers required by the U.S. Patent and Trademark Office.

4. I am an attorney representing Riverborne in said action.

5. A copy of Riverborne's First Amended Complaint, filed September 24, 2001, is attached hereto as Exhibit A.

6. No trial has yet begun in said action, and no judgment has been entered in said action.

7. Mr. Hodes's first attorneys petitioned the Court in said action to be allowed to withdraw from further representation of Mr. Hodes in said action, and the Court granted the requested permission.

8. Subsequently, Mr. Hodes retained new attorneys of the Memphis firm named Glassman, Edwards, Wade & Wyatt, P.C. More specifically, Mr. Hodes is being represented by Todd B. Murrah, Esq., an associate at the above-named firm.

9. I know that Mr. Hodes's present work address is:

Peregrine Marketing, LLC

5350 Poplar Avenue, Suite 750

Memphis, Tennessee 38119

10. Upon information and belief, Mr. Hodes's last known residential mailing address is:

Mark B. Hodes

7009 Rose Trail Drive

Memphis, Tennessee 38135

11. On August 8, 2002, I presented Mr. Hodes with a Declaration for said Application for his execution as an inventor. This Declaration was delivered to Mr. Hodes, in its complete form and entirety, by Federal Express, with a clearly-worded letter requesting that Mr. Hodes sign and return the enclosed documents. Enclosed in the documents were both the Declaration and the Application, both of which were made available for Mr. Hodes to view at the same time.

12. On August 9, 2002, the following day, I personally spoke with Mr. Hodes in a telephonic conversation, and he expressly and unequivocally refused to sign said Declaration for said Application. Moreover, Mr. Hodes stated quite clearly that "it has always been" his position that he would refuse to sign any such Declaration, and further stated that he would never sign any such Declaration in the future.

13. I have personally met Mr. Hodes on two occasions at the Shelby County Courthouse since that date. First, on approximately October 28, 2002, I approached the Chancellor with both Mr. Hodes and his counsel as they requested the continuance of a motion that I docketed for argument. Second, on November 7, 2002, I appeared before the Chancellor with both Mr. Hodes and opposing counsel to argue that motion. At neither time did Mr. Hodes offer to retract his position or change his stance regarding his refusal to sign the Declaration. Rather, Mr. Hodes has pursued the pending litigation in such a fashion that clearly demonstrates his refusal to sign the Declaration.

14. On March 12, 2003, and again on March 13, 2003, I had discussions with Mr. Murrah regarding the possibility of getting Mr. Hodes to sign the declaration. Mr. Murrah is registered to practice before the United States Patent and Trademark Office, and fully understands the significance of my request to get his client to sign the

declaration. I forwarded the declaration directly to Mr. Murrah at his office, which is located at 26 North Second Street, Memphis, Tennessee, 38103. Subsequently, I forwarded to Mr. Murrah via hand delivery the Application Data Sheet pertaining to this Application, the Patent Application itself with the Claims attached, the Formal Drawings submitted therewith, and all Prior Art disclosed in support of this Application.

15. Initially, Mr. Murrah indicated to me via telephone that he saw no reason to assist my client by getting his client to sign the declaration. Subsequently, Mr. Murrah stated that he would review the matter with his client, Mr. Hodes, and that he and his client would inspect the materials that I forwarded to them in conjunction with the declaration.

16. Mr. Murrah first indicated that he and Mr. Hodes would have an "answer" regarding his client's willingness to sign the declaration, and would submit the answer to me during the week of March 24, 2003. Neither Mr. Murrah nor Mr. Hodes has offered to sign the declaration, despite complete knowledge of all pertinent facts, as demonstrated by discussions between counsel. Mr. Murrah and Mr. Hodes are also aware of the deadline for submission of this declaration, and have failed to offer to sign the declaration by the agreed upon deadline.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of this application or any patent issued thereon.

Date: 4-4-03

Bill M. Wade

Bill M. Wade

Tennessee B.P.R. No. 21056

Attorney for Riverborne

Communications, LLC

PIETRANGELO COOK PLC

6410 Poplar Avenue, Suite 190

Memphis, Tennessee 38119

Phone: (901) 685-2662

Fax: (901) 685-6122



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Application of: Barry J. Fiala and Mark B. Hodes
Application No. 10/041,934
Filed: January 8, 2002
Group Art Unit: 2161
Examiner: (unknown)
Assignee: Riverborne Communications, LLC
Att'y Docket No.: A0,031
For: Point-of-Sale Activation and Subsequent Registration of Products

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OFFICE OF PETITIONS

Certificate of Mailing under 37 C.F.R. § 1.8

I hereby certify that this Declaration of Russell H. Walker, Esq., is being deposited is being deposited by me with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to:

U.S. Patent and Trademark Office
P.O. Box 2327
Mail Stop DAC
Arlington, VA 22202

on 4/4/2003.
Date: 4/4/2003

Russell H. Walker
Russell H. Walker
U.S.P.T.O. Registration No. 35,401

**Declaration of Russell H. Walker, Esq.
in Support of Petition under 37 C.F.R. § 1.47(a)
when an Inventor Refuses to Sign**

I, Russell H. Walker, hereby declare as follows:

1. I am an attorney licensed to practice in the State of Tennessee, having a Tennessee Board of Professional Responsibility registration number of 015270.
2. I am a patent attorney licensed to practice before the U.S. Patent and Trademark Office, having a U.S.P.T.O. Registration Number of 35,401.
3. I am the attorney of record for Riverborne Communications, LLC, for prosecution of its instant application 10/041,934.
4. Upon information and belief, Mark B. Hodes is one of the co-inventors of the

invention described in said application 10/041,934.

5. I previously given, *inter alia*, true copies of the following items, as filed with the U.S.P.T.O., to Bill M. Wade (an attorney representing Riverborne Communications, LLC) and/or his law firm of Pietrangelo and Cook, for transmittal to Mr. Hodes and/or his attorney(s):

- a. Application with claims as filed, including formal drawings;
- b. Declaration for Patent Application including Application Data Sheet; and,
- c. Forms PTO-1449 with attached references for all Information Disclosure Statements as filed pursuant to 37 C.F.R. § 1.56.

6. Upon information and belief, the above-recited documents have been provided by Mr. Wade to Mr. Hodes and/or Mr. Hodes' attorney, Todd B. Murrah.

7. On April 4, 2003, Todd B. Murrah, attorney for Mr. Hodes, telephoned me and verified that he had received the above-recited documents from Mr. Wade, and Mr. Murrah, in his capacity as Mr. Hodes' attorney, stated that Mr. Hodes refused to sign the Declaration for this application.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of this application or any patent issued thereon.

Date: 4/4/2003

Russell H. Walker

Russell H. Walker
U.S.P.T.O. Registration No. 35,401
Tennessee B.P.R. #015270
Walker, McKenzie & Walker, P.C.
6363 Poplar Ave., Suite 434
Memphis, Tennessee 38119-4896
Tel. No.: (901) 685-7428
Attorney for Riverborne Communications, LLC



DAC 8

Re: Patent Application

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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OFFICE OF PETITIONS

TRANSMITTAL LETTER

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Mail Stop DAC
Arlington, VA 22202

on 4/4/2003
Date: 4/4/2003

Russell H. Walker
Russell H. Walker
U.S.P.T.O. Registration No. 35,401

TO THE COMMISSIONER FOR PATENTS:

Sir:

Enclosed herewith are the documents set forth hereinbelow for processing:

- (1) Response and Request for Reconsideration of Decision on Petition
(4 pages);
- (2) Declaration of Bill M. Wade (5 pages) with attached Certificate of Mailing (1 page) and Exhibit A (10 pages);
- (3) Declaration of Russell H. Walker (2 pages);
- (4) Petition for Four-Month Extension of Time (two pages) in triplicate

with Self-Addressed Stamped Envelope;

- (5) Fee Transmittal Form PTO/SB/17;
- (6) Check in the amount of \$725.00 for the Extension of Time fee.

Please charge any additional fees or credit any overpayment concerning the filing of the enclosed documents to Deposit Account No. 23-0125.

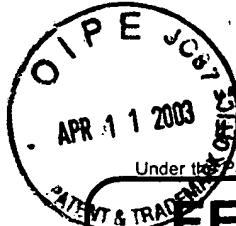
Respectfully submitted,

Riverborne Communications, LLC

Date: 4/4/2003

By: Russell H. Walker

Russell H. Walker
U.S.P.T.O. Registration No. 35,401
Walker, McKenzie & Walker, P.C.
6363 Poplar Ave., Suite 434
Memphis, Tennessee 38119-4896
Tel. No. (901) 685-7428
Attorney for
Riverborne Communications, LLC



Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

FEET TRANSMITTAL for FY 2003

Effective 01/01/2003. Patent fees are subject to annual revision.

Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$ 725.00)

Complete if Known

Application Number	10/041,934
Filing Date	January 8, 2002
First Named Inventor	Barry J. Fiala
Examiner Name	
Art Unit	2161
Attorney Docket No.	A0_031

METHOD OF PAYMENT (check all that apply)

Check Credit card Money Order Other None

Deposit Account:

Deposit Account Number: 23-0125
Deposit Account Name: Walker, McKenzie & Walker, P.C.

The Commissioner is authorized to: (check all that apply)

Charge fee(s) indicated below Credit any overpayments
 Charge any additional fee(s) ~~dependent on the appearance of the application~~
 Charge fee(s) indicated below, except for the filing fee to the above-identified deposit account.

FEE CALCULATION

1. BASIC FILING FEE

Large Entity	Small Entity	Fee Code (\$)	Fee Code (\$)	Fee Description	Fee Paid
1001 750	2001 375			Utility filing fee	
1002 330	2002 165			Design filing fee	
1003 520	2003 260			Plant filing fee	
1004 750	2004 375			Reissue filing fee	
1005 160	2005 80			Provisional filing fee	
SUBTOTAL (1)		(\$)			

2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE

Total Claims	Extra Claims	Fee from below	Fee Paid
	-20** =		
Independent Claims	- 3** =		
Multiple Dependent			

Large Entity	Small Entity	Fee Description
1202 18	2202 9	Claims in excess of 20
1201 84	2201 42	Independent claims in excess of 3
1203 280	2203 140	Multiple dependent claim, if not paid
1204 84	2204 42	** Reissue independent claims over original patent
1205 18	2205 9	** Reissue claims in excess of 20 and over original patent
SUBTOTAL (2)		(\$)

**or number previously paid, if greater; For Reissues, see above

3. ADDITIONAL FEES

Large Entity	Small Entity	Fee Description	Fee Paid
1051 130	2051 65	Surcharge - late filing fee or oath	
1052 50	2052 25	Surcharge - late provisional filing fee or cover sheet	
1053 130	1053 130	Non-English specification	
1812 2,520	1812 2,520	For filing a request for ex parte reexamination	
1804 920*	1804 920*	Requesting publication of SIR prior to Examiner action	
1805 1,840*	1805 1,840*	Requesting publication of SIR after Examiner action	
1251 110	2251 55	Extension for reply within first month	
1252 410	2252 205	Extension for reply within second month	
1253 930	2253 465	Extension for reply within third month	
1254 1,450	2254 725	Extension for reply within fourth month	725
1255 1,970	2255 985	Extension for reply within fifth month	
1401 320	2401 160	Notice of Appeal	
1402 320	2402 160	Filing a brief in support of an appeal	
1403 280	2403 140	Request for oral hearing	
1451 1,510	1451 1,510	Petition to institute a public use proceeding	
1452 110	2452 55	Petition to revive - unavoidable	
1453 1,300	2453 650	Petition to revive - unintentional	
1501 1,300	2501 650	Utility issue fee (or reissue)	
1502 470	2502 235	Design issue fee	
1503 630	2503 315	Plant issue fee	
1460 130	1460 130	Petitions to the Commissioner	
1807 50	1807 50	Processing fee under 37 CFR 1.17(q)	
1806 180	1806 180	Submission of Information Disclosure Stmt	
8021 40	8021 40	Recording each patent assignment per property (times number of properties)	
1809 750	2809 375	Filing a submission after final rejection (37 CFR 1.129(a))	
1810 750	2810 375	For each additional invention to be examined (37 CFR 1.129(b))	
1801 750	2801 375	Request for Continued Examination (RCE)	
1802 900	1802 900	Request for expedited examination of a design application	
Other fee (specify)			
*Reduced by Basic Filing Fee Paid		SUBTOTAL (3) (\$)	
		725	

SUBMITTED BY

(Complete if applicable)

Name (Print/Type)	Russell H. Walker	Registration No. (Attorney/Agent)	35,401	Telephone	901-685-7428
Signature				Date	4/4/2003

WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.

This collection of information is required by 37 CFR 1.17 and 1.27. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, Washington, DC 20231. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, Washington, DC 20231.

If you need assistance in completing the form, call 1-800-PTO-9199 (1-800-786-9199) and select option 2.

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

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RIVERBORNE COMMUNICATIONS, LLC,

OFFICE OF PETITIONS

Plaintiff,

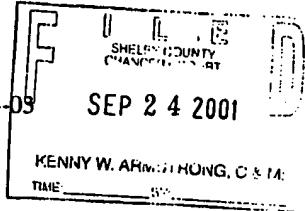


v.

MARK HODES,

Defendant.

No. CH-01-1564-09



**FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, AND MONEY DAMAGES**

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF SHELBY
COUNTY, TENNESSEE:

COMES NOW Riverborne Communications, LLC ("Riverborne") and for its cause of
action would show the Court as follows:

1. Riverborne is a limited liability company formed and existing under the laws of the State of Tennessee with its principal place of business at 119 South Main Street, Suite 500, Peabody Place, Memphis, Tennessee 38103.
2. Defendant, Mark B. Hodes ("Hodes") at all times pertinent herein was and is a citizen of Shelby County, Tennessee who resided at 6681 Hidden Fern Lane East, Bartlett, Tennessee 38135.
3. Barry Fiala, Inc. ("Fiala, Inc."), a non-party to this action, is the assignee and sole owner of United States Patent No. 5,918,909 ("909 Patent"), which was issued on July 6, 1999. Fiala, Inc. currently owns 30% of the membership interests in Riverborne.
4. On or before the spring of 2000, Hodes was employed by Riverborne, among other things, to develop improvements and enhancements to and new applications for the '909 Patent. Prior to his employment with Riverborne, Barry J. Fiala ("Fiala"), a non-party to this action, and the president of Fiala, Inc. and a member of Riverborne, who previously held 50% and who currently holds 20.13% of the membership interests in Riverborne had extensive pre-employment discussions with Hodes. During these discussions Hodes and Fiala agreed to condition Hodes's potential employment with Riverborne upon Hodes' ability to conceive,



develop and reduce to practice improvements and enhancements to and new applications for the '909 Patent.

5. During Hodes's employment with Riverborne, Hodes held himself out as and acted in the capacity of president of Riverborne. Hodes currently holds 13.13% of the membership interests in Riverborne.

6. It was agreed and understood between Riverborne and Hodes that any inventions, and any improvements, developments or enhancement to or any new applications for the '909 Patent made by Hodes, would immediately become the property of and belong to Riverborne.

7. Between the date of his employment and January 5, 2001, Hodes and Fiala developed various new inventions and improvements and enhancements to and new applications for the '909 Patent for point of sale activation of software and metered accounts ("Invention"). Pursuant to the agreements between Riverborne and Hodes and due to Hodes position with Riverborne, the Invention immediately became the property of and thereafter belonged Riverborne.

8. Based on the agreements between Riverborne and Hodes, on or about January 5, 2001, Riverborne, in its role as assignee of all right, title and interest to the Invention, filed an application for a provisional patent on the Invention with the United States Patent and Trademark Office. The inventors of the Invention were shown on such application for provisional patent as Fiala and Hodes and, as agreed, the assignee of the Invention was shown as Riverborne.

9. Even though Hodes does not own any right, title or interest in or to any part of the Invention, Hodes claims to own a portion of the Invention. By his June 27, 2001 letter, Hodes asked Russell H. Walker, the patent attorney handling the provisional patent application on the Invention on behalf of Riverborne, to either move forward with the application for a utility patent on behalf of Hodes and Fiala, or turn the file over to Susan Fentress, a patent attorney whom Hodes had engaged to represent him individually. A copy of the letter is attached hereto as EXHIBIT A and incorporated herein by reference.

10. Upon information and belief, Hodes has engaged the legal services of Susan Fentress to seek a patent for some or all of the methods and apparatus encompassed by the Invention on behalf of Hodes individually. Since Hodes no longer owns any interest in the Invention, any efforts by him or his attorney to obtain a patent will unduly and improperly impair Riverborne's efforts to obtain a patent on the Invention in Riverborne's own name.

11. On June 22, 2001, Hodes tendered his resignation as an employee for Riverborne.

That resignation was duly accepted by Riverborne.

12. At the time of his departure Hodes took with him documents and records of Riverborne which included confidential, proprietary and trade secret information belonging to Riverborne. Upon information and belief Hodes continues to use the contents of those documents, records, information and trade secrets for his personal benefit and to the detriment of Riverborne. Additionally, Hodes has disclosed secret and proprietary information of Riverborne to persons or entities outside of Riverborne who had no legal right to receive such information.

13. At all times pertinent to this action Hodes owed to Riverborne a duty not to make any unauthorized disclosure of confidential or proprietary information belonging to Riverborne.

14. Hodes was asked to return the documents and information but failed and refused to do so. Indeed, Hodes falsely represented that he had returned all of Riverborne's documents and information.

15. At the time of his resignation and departure from Riverborne, Hodes owed Riverborne the sum of Ten Thousand Dollars (\$10,000.00), which had been loaned to him by Riverborne. Riverborne set off Hodes' Ten Thousand Dollars (\$10,000) debt with Five Thousand Dollars (\$5,000.00) which was owed to him by Riverborne for services rendered prior to his resignation and departure. Accordingly, Hodes still owes Riverborne the sum of Five Thousand Dollars (\$5,000), the unpaid balance on his loan.

16. At the time of his resignation and departure, Hodes had obtained additional advances from Riverborne for business expenses of Six Thousand Two Hundred Four and 63/100 Dollars (\$6,204.63) which Hodes anticipated incurring on behalf of Riverborne.

17. At the time he received the advances, Hodes knew that Riverborne required evidence that business expenses were actually incurred on behalf of Riverborne. Hodes never provided any evidence that he had incurred those expenses on behalf of Riverborne and, therefore, owes Riverborne the additional sum of Six Thousand Two Hundred Four and 63/100 Dollars (\$6,204.63).

COUNT I
DECLARATORY JUDGMENT

18. All averments of paragraphs 1 through 17 are incorporated into this count as if fully recited herein.

19. The actions of Hodes indicate that he is attempting to claim and to exercise ownership rights over the Invention even though he previously transferred and assigned all such right, title and interest in and to the Invention to Riverborne.

20. The actions of Hodes indicate that he is attempting to claim and to exercise ownership rights over the Invention even though Riverborne hired Hodes, among other things, specifically to conceive and reduce to practice inventions, and improvements and enhancement to and new applications for the '909 Patent, including, without limitation, the Invention.

21. The actions of Hodes indicate that he is attempting to claim and to exercise ownership rights over the Invention even though he served Riverborne as the president thereby creating a fiduciary duty, which duty included, but is not limited to, the assignment of rights of any patentable invention, including, without limitation the Invention, to his employer, Riverborne.

22. Pursuant to Tenn. Ann. Code § 29-14-101 *et. seq.*, Riverborne asks the Court to enter an order declaring the parties right, title and interest in and to the Invention. More precisely, Riverborne asks the Court declare that all right, title and interest in and to the Invention is vested in Riverborne and that Hodes has no right, title or interest in or to the Invention whatsoever.

23. Riverborne further asks the Court to enjoin Hodes from falsely representing to others that he has any ownership in the Invention.

COUNT II
CONVERSION

24. The averments of paragraph 1 through 23 are incorporated into this count as if fully recited herein.

25. The documents and information which Hodes removed from Riverborne were property of Riverborne.

26. Hodes unlawfully converted and appropriated to his own use documents and information which belonged to Riverborne and has retained copies of Riverborne's records in his own possession. Unless a mandatory injunction is issued requiring Hodes to return all Riverborne documents and information to Riverborne, Riverborne will suffer irreparable injury by virtue of Hodes improperly using those records for his own personal benefit and to the detriment of Riverborne.

27. Riverborne asks the Court to enter a mandatory injunction directing Hodes to return all Riverborne documents and information to Riverborne and to refrain from any use of such documents or information or trade secrets which he learned while employed by Riverborne.

COUNT III
BREACH OF CONTRACT

28. The averments of paragraphs 1 though 27 are incorporated into this count as if fully recited herein.

29. Pursuant to his agreements with Riverborne, Hodes owes Riverborne the sum of Eleven Thousand Two Hundred Four and 63/100 Dollars (\$11,204.63).

30. By debt owed, Hodes violated his agreement with Riverborne such that Hodes now owes Riverborne the sum of Eleven Thousand Two Hundred Four and 63/100 Dollars (\$11,204.63).

COUNT IV
MISAPPROPRIATION OF TRADE SECRETS

31. The averments of paragraphs 1 through 30 are incorporated into this count as if fully recited herein.

32. Upon information and belief Hodes unlawfully took from Riverborne documents and information which constitute "trade secrets" as that term is defined by Tenn. Code Ann. § 47-25-1702.

33. Upon information and belief, Hodes has and continues to wrongfully communicate to third parties the trade secrets of Riverborne, which Hodes learned only by virtue of his management position with and his ownership of membership interests in Riverborne.

34. Upon information and belief, Hodes used Riverborne's trade secrets without Riverborne's express or implied consent in violation of Tenn. Code Ann. § 47-25-101 *et seq.*

35. If the documents and information, which include trade secrets, are not returned to Riverborne, it will suffer irreparable harm. Injunctive relief is expressly authorized by Tenn. Code Ann. § 47-25-1703.

COUNT V
BREACH OF FIDUCIARY DUTY

36. The averments of paragraphs 1 through 35 are incorporated into this count as if fully recited herein.

37. Defendant Hodes was an owner of membership interests in and a manager of Riverborne and enjoyed a position of dominion and influence over Riverborne.

38. By virtue of his position with Riverborne, Hodes owed a fiduciary duty to act in the best interest of Riverborne, to refrain from using Riverborne's trade secrets and other property to compete against Riverborne and to refrain from usurping a corporate opportunity.

39. Hodes has breached his fiduciary duties by misappropriating Riverborne's trade secrets, including, but not limited to, the contents of Riverborne's files and using them against Riverborne for marketing efforts which Riverborne was pursuing or intended to pursue or could, in the normal course of business, pursued, prior to Hodes' resignation.

40. Hodes has breached his fiduciary duty to Riverborne by misappropriating Riverborne's files.

41. Hodes has breached his fiduciary duty to Riverborne by usurping corporate opportunities previously held by Riverborne.

42. Hodes has breached his fiduciary duties to Riverborne by refusing to assign to Riverborne all of his rights, title and interests to, including, without limitation, the Invention, which I Invention Hodes may have conceived and assisted in reduction to practice solely by virtue of his position as President of and an owner of membership interests in Riverborne.

43. As a result of these breaches, Riverborne is suffering immediate and irreparable harm and damages which are difficult to determine at present.

COUNT VI
UNFAIR COMPETITION

44. The averments of paragraphs 1 through 43 are incorporated into this count as if fully recited herein.

45. Hodes owed Riverborne a fiduciary duty, as an employee and manager of and an owner of membership interests in Riverborne, to act in the best interests of Riverborne, to refrain from using Riverborne's trade secrets and to refrain from usurping Riverborne's corporate opportunities.

46. As a result of the management position Hodes enjoyed with Riverborne and the frequency and quantity of contacts with customers of Riverborne, Hodes was in a position of dominion and influence over Riverborne.

47. Hodes had a common law and statutory duty to refrain from misappropriating the trade secrets of Riverborne.

48. Hodes' misappropriation of trade secrets and breach of fiduciary duties by taking files and other secrets and using them to compete against Riverborne constitutes unfair competition in violation of the common law of Tennessee.

49. Hodes misappropriation of Riverborne's files and marketing materials such that Riverborne was left without the ability to compete for business and/or was left in a significantly impaired position constitutes unfair competition in violation of the common law of Tennessee.

50. As a result of the unfair competition of Hodes, Riverborne is being irreparably harmed and damaged in an amount which, at present, is difficult to accurately ascertain.

COUNT VII
UNJUST ENRICHMENT

51. The averments of paragraphs 1 through 50 are incorporated into this count as if fully recited herein.

52. Riverborne spent significant sums and expended significant resources to market products to the potential customers identified in the files in question and in developing marketing strategies and literature.

53. It would cost a third party significant sums and time to recreate these customer files and marketing materials.

54. Hodes could not have recreated the files which Hodes and those acting in concert with Hodes are now using to compete against Riverborne without having access to Riverborne's files.

55. In fact, Hodes has misappropriated Riverborne's customer files and is now using them, either directly or in concert with third parties, to compete against Riverborne.

56. As a result of having Riverborne's files and other sensitive information, Hodes has been able to avoid expending the significant sums and time attempting to recreate the customer files.

57. Accordingly, Hodes has been unjustly enriched by having access to files and information which Riverborne spent significant money and time in creating.

58. As a result of this unjust enrichment, Riverborne has been irreparably harmed and damaged in an amount which, at present, is difficult to accurately ascertain.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Riverborne asks that the Court enter judgment in its favor directing the following:

1. That proper process issue to the defendants and that Hodes be required to answer

this Complaint;

2. That, pursuant to Tenn. Code Ann. § 47-25-1703 and this Court's equity powers, the Court issue a temporary restraining order whereby Hodes and anyone acting in concert with Hodes, are: (1) enjoined and restrained from engaging in competition with Riverborne as to those projects or accounts on which Hodes was working prior to resigning and those projects or accounts for which Hodes misappropriated Riverborne's or Fiala's files or any portions thereof and (2) ordered not to utilize all files, documents and tangible things which were taken from Riverborne or Fiala.

3. That the Court order an accounting of Riverborne's files and possessions to determine what files (or portions thereof), documents and tangible things were taken from Riverborne and Fiala, Inc.;

4. That the Court order an accounting of the electronic data files and possessions of Hodes and anyone acting in concert with Hodes, to determine what electronic files and data (or portions thereof), electronic data and computer files were copied and misappropriated by Hodes prior to his resignation;

5. That the Court order an accounting of the financial records of Hodes and anyone acting in concert with Hodes, to determine what sales if any have been made on those projects or accounts which were being pursued by Riverborne or Fiala, Inc. through Hodes prior to his resignation from Riverborne;

6. That the Court order a divestiture of any and all actual profits made by and the assignment of any contract, including, without limitation, any financial arrangement, made by Hodes or anyone acting in concert with Hodes on all sales or contracts or other contractual arrangements which have been made on those projects or accounts on or customers or potential customers which Hodes was working on or which Hodes might have worked on on behalf of Riverborne prior to his resignation from Riverborne;

7. That, pursuant to Tenn. Code Ann. § 47-25-1704 and this Court's inherent powers, the Court grant plaintiff its actual damages which at present are estimated to be in amount greater than \$50,000;

8. That the Court grant plaintiff punitive damages for common law misappropriation of trade secrets, breach of fiduciary duty and conversion in an amount greater than \$250,000;

9. That, pursuant to Tenn. Code Ann. § 47-25-1704 and this Court's inherent powers, the Court grant plaintiff damages for unjust enrichment in an amount to be determined at trial;

10. That, pursuant to Tenn. Code Ann. § 47-25-1704, the Court grant plaintiffs exemplary damages in the amount twice plaintiff's actual damages for statutory misappropriation of trade secrets;

11. That, pursuant to Tenn. Code Ann. § 47-25-1705, the Court grant plaintiffs their reasonable attorneys' fees and costs;

12. That the Court assess the costs of this action against Hodes;

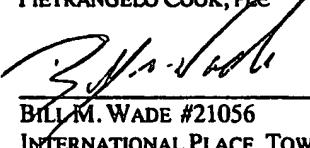
13. That the Court grant such further relief to which plaintiffs may be entitled;

14. That Riverborne owns all right, title and interest in and to the Invention; and

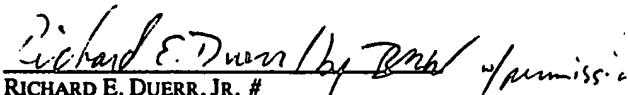
15. That Hodes owns no right, title or interest in and to the Invention.

Respectfully submitted,

PIETRANGELO COOK, PLC



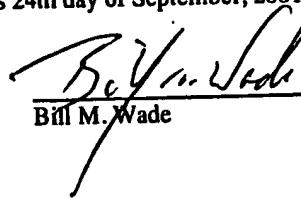
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CERTIFICATE OF SERVICE

I, Bill M. Wade, hereby certify that a true and accurate copy of the foregoing First Amended Complaint has been served via Fascimile and U.S. Mail to Charles F. Morrow, P.O. Box 171443, Memphis, Tennessee, 38187, on this 24th day of September, 2001.



Bill M. Wade